(2)

No. 90-514

In The

Supreme Court of the United States

October Term, 1990

ONAN CORPORATION,
a Delaware Corporation,

Petitioner,

v.

INDUSTRIAL STEEL CONTAINER COMPANY,
a former Minnesota corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should this Court grant certiorari to decide whether the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) preempts or alters long-standing law on corporate capacity to be sued, when there is no conflict among the circuits and the real issue in this case involves an unexplained failure to commence suit within the liberal time afforded under the applicable state survival statute following corporate dissolution?

RULE 29.1 STATEMENT

Pursuant to Supreme Court Rule 29.1, the only other company that was previously affiliated with Industrial Steel Container Company was its parent and sole shareholder, Stavoco Industries, Inc. (Stavoco), a liquidated and dissolved Minnesota corporation.

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STATEMENT OF THE CASE

Petitioner Onan Corporation (Onan) has discussed many of the central facts. A few additional matters, however, deserve mention in order that the petition may be considered and decided in proper perspective.

Industrial Steel Container Company (Industrial), a liquidated and dissolved Minnesota corporation, once manufactured new steel drums and reconditioned used empty steel drums in Saint Paul, Minnesota for many years. It closed its manufacturing and reconditioning operations in 1978, and ceased occupying its plant site in 1979. It then sold its physical assets to many buyers throughout the United States. It conducted no drum manufacturing or reconditioning operations after 1979.

On September 2, 1983, a statutory resolution of voluntary dissolution of Industrial was adopted, which was filed with the Minnesota Secretary of State pursuant to statute on September 6, 1983. On October 28, 1983, George J. Rutman (Rutman), in his capacity as the duly appointed Trustee in Dissolution of Industrial, filed the required statutory Certificate of Voluntary Dissolution with the Secretary of State. At that point, Industrial ceased to exist as a matter of law. No company succeeded to its existence. Rather, Stavoco, its sole shareholder, received the net proceeds of the dissolution. Stavoco has also since been voluntarily liquidated and dissolved.

By correspondence dated December 9 and 16, 1983, and April 27 and 30, 1984, Rutman specifically notified both the Minnesota Pollution Control Agency (MPCA) and the United States Environmental Protection Agency (EPA) of Industrial's liquidation and dissolution. That correspondence was available to petitioner on and after those dates. In addition, Industrial provided information to the MPCA regarding its hauler's use of the landfill in

question. Its disposal of waste was neither constant in volume from year to year nor was it all "hazardous".[1]

It is undisputed that no claim or suit was brought against Industrial until petitioner commenced this action on October 28, 1988, precisely five years after the Certificate of Voluntary Dissolution was publicly filed with the Minnesota Secretary of State, and two years after the Minnesota statute permitting suits to be brought against dissolved corporations had expired.

SUMMARY OF THE ARGUMENT

This Court should not grant certiorari in this case, since there is no conflict to resolve. The lower court decisions fall neatly into two non-conflicting categories. In those cases where suit under CERCLA was permitted, either the corporations had not taken all steps required for effective or complete dissolution under the appropriate state statutes, or there was a demonstrably improper motive involved. Therefore, there is no conflict with the cases that prohibit suit when a corporation has fully, openly and fairly dissolved several years before suit was brought. Those decisions have carefully analyzed the federal policies underlying CERCLA, and have read the federal and state law on corporate capacity to be sued in

[1] Petitioner's claims regarding the purported "volume" and "hazard" attributable to Industrial (Pet. at 11) are disputed. It was unnecessary, of course, for the courts below to deal with the merits of these claims. Likewise, it should be noted that many large, responsible corporations are in the process of resolving the problems at the landfill in question.

harmony with CERCLA. The courts have not found preemption, and have not seen their decisions as an impermissible method to avoid liability even though suit is precluded.

In addition, the underlying issue in this case does not revolve around CERCLA preemption of the law of corporate capacity to be sued. Rather, petitioner had ample time, three years under the Minnesota survival statute, to bring suit against Industrial. Inexplicably, it did not bring a timely suit. Accordingly, there is no reason to revisit corporate capacity when the issue is something else entirely. The courts below clearly recognized this infirmity. Petitioner should not be permitted to employ a petition for certiorari to save itself from its own neglect and inaction.

ARGUMENT

I. THE CAPACITY OF A CORPORATION TO BE SUED UNDER CERCLA IS GOVERNED BY F.R.C.P. 17(b) AND STATE LAW, AND CERCLA DOES NOT PREEMPT OR OTHERWISE CHANGE THAT BODY OF LAW.

Curiously, in its lengthy petition, petitioner makes no mention whatever of F.R.C.P. 17(b) and the long line of cases, including CERCLA cases, which hold that the capacity of a corporation to be sued in the federal courts in any kind of action is determined by state law. Yet, this rationale was fundamental to the decision of the courts below, and cannot be ignored.

In determining the applicability of F.R.C.P. 17(b) and state law to CERCLA actions, the important policies underlying CERCLA can be taken into account. The District Court was fully aware of the "threat to health and safety cause by hazardous waste in our society and the need for strong measures to attack this problem." (Petitioner's Appendix at A-18-19.) Even with this in mind, the court correctly decided, and the Eighth Circuit affirmed, that F.R.C.P. 17(b) and state law are not preempted by CERCLA.

F.R.C.P. 17(b) provides in pertinent part:

> The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.

As recognized by the courts below, F.R.C.P. 17(b) is actually a codification of long-standing federal law. *See Oklahoma Natural Gas Company v. Oklahoma*, 273 U.S. 257, 259-260 (1927); *David Lupton's Sons Co. v. Automobile Club of America*, 225 U.S. 489 (1912). The leading treatise states that "(t)he principle that a corporation's capacity to sue and be sued is determined by the law of the state of its incorporation was applied in the federal courts even before the adoption of the federal rules and has been characterized as expressive of the general law", and that "the federal courts have held that the capacity of a dissolved corporation to sue and be sued is determined by the law of the state in which it was organized." 6A Wright, Miller & Kane, *Federal Practice and Procedure*, §§ 1561, 1563 (1990).

There is no evidence, as petitioner tries to argue, that the "plain language" of CERCLA expressly preempts any

and all state law of corporate capacity to be sued. The language contained in 42 U.S.C. § 9607(a) states that "(n)otwithstanding any other provision or rule of law, . . . any person . . . shall be liable . . . " Petitioner complains that the decisions of the courts that follow F.R.C.P. 17(b) and state law limit suit, and are contrary to Congressional policy. But F.R.C.P. 17(b) and the state of law of corporate capacity can be read in complete harmony with CERCLA. The isolated phrase upon which petitioner relies can be read to mean that underlying *remedies* established by CERCLA are not to be modified by any preexisting law, rather than dealing with capacity to be sued. *See, e.g., Matter of Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980) (dealing with similar language in the Federal Water Pollution Control Act).

In addition, CERCLA defines "person" to include "corporation", but not a "former" or "dissolved" corporation. 42 U.S.C. § 9601(21). A dissolved corporation is simply not a "person" in the eyes of the law. It ceases to exist upon expiration of the statute of repose following dissolution. Indeed, in *United States v. Distler*, 741 F.Supp. 643 (W.D. Ky. 1990), the court did not even need to reach the preemption issue after examining the language of CERCLA. The court, while acknowledging that the definition of "person" in CERCLA was very broad, determined that the "statute is silent, however, on the liability of dissolved corporations . . . " 741 F.Supp. at 645. The court stated that, whether or not procedurally the dissolved corporation had the capacity to be sued, the first determination to be made was whether the substantive law of CERCLA imposed liability. The court determined this to

be a case of first impression involving a question of federal law. *Id.* at 646. The court held that "[b]ecause the United States has presented no convincing authority to support its position that a corporation which has completely wound down and distributed its assets can be held liable under CERCLA," the case had to be dismissed. *Id.* at 647.

F.R.C.P. 17(b) and state law establish when a corporation has the capacity to be sued. If Congress had intended in CERCLA to preempt either body of law with respect to corporate capacity, it did not clearly communicate that intention. Indeed, in a related context regarding the ability to pierce the corporate veil and impose liability on a parent company under CERCLA, the court in *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), expressed just that sentiment regarding congressional intent. The appellants could point to little in the legislative history to allow piercing under anything but traditional principles, merely an "inherent underlying intent of Congress to hold those who profited from hazardous waste sites responsible for the cost of clean up . . . " The court in response stated, "without an express Congressional directive to the contrary, common-law principles of corporate law . . . govern our court's analysis." 893 F.2d at 83. In fact, consistent with all of these decisions, the court would not pierce the corporate veil absent a "sham to perpetrate a fraud or avoid personal liability". *Id.* The parent was not liable for its subsidiary, even considering the broad remedial scope of CERCLA.

Nothing in F.R.C.P. 17(b) or state law is contrary to congressional policy under CERCLA. Full effect can be given to federal policies and the federal law of corporate

capacity to be sued if a party seeking relief simply sues within the permissible time.

Requiring timely commencement of suit is entirely consistent with the important policy goals of CERCLA or any other salutary remedial statutory scheme. No one can deny that CERCLA contains strong and important policies, and serves a most valuable purpose. There can be no question that it, like many other federal and state laws which have been enacted to provide solutions to problems on the basis of developing knowledge, is critically necessary. This, however, misses the mark, and conceding this point in no way changes the result reached below. Every remedial statute ever enacted to protect and promote the health and welfare of this country and its people is important in its own right. CERCLA is no exception. Nonetheless, proceedings under every important law must be brought in a timely fashion, under either a particular statute's own period of limitations or within periods of repose mandated by F.R.C.P. 17(b) and the state law of corporate capacity. In a sense, petitioner is asking the courts to hold that CERCLA is so important that it outweighs the importance of bringing suit timely, and excuses otherwise inexcusable, dilatory inaction.

This is simply not so. Bringing a claim timely, under either a statute of limitations or repose, or before a "person" ceases to be viable, is unquestionably an important policy upon which the American legal system has functioned for generations. Indeed, such statutes are looked upon with favor by this Court. *See, e.g., Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well ordered

judicial system."); *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). It is simply axiomatic that if one has a case, the facts and statutes should be reviewed so that the case may be brought timely. Otherwise, it is barred. Important remedial statutes, therefore, can and do peacefully coexist with periods of limitation. There is no reason to change that important underpinning of our judicial system here.

II. THIS COURT DOES NOT NEED TO REVISIT THE DOCTRINE OF CORPORATE CAPACITY TO BE SUED, SINCE THE CASES DECIDED IN THE LOWER COURTS DO NOT CREATE A CONFLICT AND THE TRUE ISSUE HERE IS NOT ABOUT CAPACITY, BUT FAILURE TO ACT WITHIN THE LIBERAL TIME FRAME PROVIDED BY THE MINNESOTA CORPORATE DISSOLUTION STATUTE.

A. Decisions Involving Corporate Capacity To Be Sued Under CERCLA Are A Consistent Body Of Law.

The conflict that is said to exist among cases dealing with the issue of corporate capacity is more illusory than real. In looking at the circumstances surrounding the decisions, they can all be reconciled and read in complete harmony. Where a corporation had not perfected the dissolution or had an improper purpose in dissolving, suit under CERCLA was permitted. In other cases, suit under CERCLA was correctly prohibited.

In *United States v. Northeastern Pharm. & Chem. Co., Inc.*, 579 F.Supp. 823 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) ("NEPACCO"), a CERCLA case, the court

determined that if a corporation had effectively dissolved, the correct route was to follow F.R.C.P. 17(b) and state law. The court nonetheless permitted suit only because the corporation had not perfected its dissolution, in that it failed to file a certificate of voluntary dissolution with the Secretary of State. As the decision pointed out, the corporation was "not completely dead for all purposes, but merely in a 'state of coma' during which it is still subject to suit . . . " 810 F.2d at 746. That situation, of course, is not involved here. All steps required to be taken to perfect dissolution, including filing the certificate, were completed on behalf of Industrial.

There is strong support for the Eighth Circuit's decision in *NEPACCO* that F.R.C.P. 17(b) and hence state law, govern the capacity of a corporation to be sued in a CERCLA action. In a later decision, *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 631 F.Supp. 303 (N.D. Calif. 1986), *aff'd* 817 F.2d 1448 (9th Cir. 1987), both courts cited *NEPACCO*, agreeing with its use of F.R.C.P. 17(b) and state law, and also applied pertinent provisions of California state law in holding that the dissolved corporation could not be sued under CERCLA.

In *Levin*, the corporation had fully and properly dissolved in accordance with California state law. The court looked at the language and purpose of CERCLA and rejected arguments that using California state law would prevent imposition of liability. The court saw this as a mischaracterization of the law of capacity, and would not allow suit to go forward. *Accord: United States v. Moore*, 698 F.Supp. 622, 624 (E.D. Va. 1988) ("The capacity of a

corporation to sue or be sued [under CERCLA] is determined by the law of its incorporation" [citing F.R.C.P. 17(b) and *NEPACCO*]).

Cases which might seemingly support an express preemption argument in reality are dealing with issues other than an open and effective dissolution. In *United States v. Sharon Steel Corp.*, 681 F.Supp. 1492 (D. Utah 1987), the court did not deal in depth with the state law of dissolution and capacity issues. The court merely opined that CERCLA preempted F.R.C.P. 17(b) and state law on the subject of corporate capacity to be sued. The court rejected contrary authority, and did not address the proposition that F.R.C.P. 17(b) is actually a codification of federal substantive law.

But that case, on further reading, is consistent with other decisions. The dissolution laws and capacity doctrine were not fully at issue. The court in *Sharon Steel* did not have to face the preemption issue squarely because the liquidating trust for the supposedly dissolved corporation had not yet distributed all of the corporation's assets when it was sued by the government. The court stated:

> Nor is the court faced with a situation in which the corporation's assets have been fully distributed and its affairs completely wound up, that is, where the corporation is not only dead but also buried. Here the funeral is still going on. Corporate assets that might be used to pay cleanup costs have not yet been distributed to shareholders. Under these facts, the court holds that CERCLA overrides the general capacity provisions of Rule 17(b) to the extent the Rule might otherwise shield a dissolved corporation from liability.

681 F.Supp. at 1498. The court was dealing with a different issue than what is involved here, and this decision does not run afoul of decisions in other cases. Suit against the corporation in *Sharon Steel* was permitted because the dissolution had not been perfected. In looking *not* at the *Sharon Steel* court's extremely brief discussion of the capacity issue, but at the holding and actual circumstances surrounding the case, it is consistent with *NEPACCO*, which applied Rule 17(b) in a CERCLA context. Both courts did not allow corporations that had supposedly dissolved but had not yet completed or perfected the dissolution proceedings to avoid suit.

In *Allied Corp. v. Acme Solvents Reclaiming Inc.*, No. 86-C-20377, slip op. (N.D. Ill. July 6, 1990), relied upon by petitioner, the court agreed with *Sharon Steel*, but took an even briefer survey of the law on this issue. The Court makes no mention of contrary authority (such as *Levin Metals* and *Moore*), in fact citing *NEPACCO* solely for the proposition that CERCLA is intended to be both remedial and retroactive, making no mention of the fact that it holds that F.R.C.P. 17(b) and state law govern the capacity of a corporation to be sued under CERCLA. But beyond those infirmities, in *Allied* there is no evidence that the dissolution was done openly and that all parties were notified. It appears that the court was eyeing the situation as one where the corporation would "merely dissolve itself and distribute its assets prior to the filing of a CERCLA action in order to completely absolve itself of any liability under the statute". (Petitioner's Appendix at A-54-55). In that case, there also appeared to be some doubt as to whether the post-dissolution survival period had run before suit was commenced.

While it may be true that F.R.C.P. 17(b) and state law should not be used as a tool or subterfuge to avoid CERCLA liability, there is no question that that was not the case here. Industrial followed all applicable laws in effecting its dissolution. In the circumstances of this case, there was certainly nothing improper about Industrial's decision to dissolve and the handling of its dissolution. Industrial had ceased doing business and undertook liquidation of its assets during the years before it actually formally dissolved. Industrial's dissolution was accomplished openly, and it repeatedly disclosed its dissolution to both the EPA and the MPCA. There is no finding that Industrial was improperly using the dissolution procedures solely as a means to avoid liability under CERCLA. Neither petitioner, nor for that matter any of its companion companies nor the state or federal governments, took the opportunity to sue Industrial during the three-year period of limitations, when Industrial never made any attempt to conceal the fact that it had liquidated and dissolved. Instead, petitioner waited another two years before acting.

Improper motive was also the concern in another case relied upon by petitioner involving personal liability under CERCLA. In *United States v. Mottolo*, 695 F.Supp. 615 (D. N.H. 1988), the court was trying to prevent an individual from wrongfully escaping liability. The defendant belatedly incorporated and then tried to use the limited liability provisions of corporate law to escape a potential preexisting CERCLA liability. The defendant admitted that he incorporated to escape that very liability, and the court found that the corporation was not viable even under the common law alter ego doctrine.

The court would not allow the defendant to use the corporate entity as an untimely created shield to escape liability. This case is thus facially distinguishable from the case at hand.

The cases relied upon by petitioner do not pose a real and direct conflict between CERCLA and the role of F.R.C.P. 17(b) and state law of corporate capacity to be sued. All of the courts permitted suit only when the dissolution was not perfected or where there was a blatantly improper purpose.

B. The True Issue In This Case Involves Failure To Act Within A Liberal And Known Time Frame Provided For Suit Following Corporate Dissolution.

Even if the Court were interested in doing so, this case is not an appropriate vehicle for revisiting the roles of F.R.C.P. 17(b) and state law of corporate capacity, since that is not the real issue here. Rather, the issue here is, why didn't petitioner or someone else sue Industrial within the liberal three-year survival period following dissolution? Industrial's dissolution was accomplished openly, and the three-year survival period was available within which to bring suit. Industrial made no secret of its dissolution; indeed, by repeated correspondence early in the survival period, the trustee in dissolution specifically notified both the MPCA and the EPA of the true facts. It is undisputed that no claim or suit was brought against Industrial until petitioner commenced this action on October 28, 1988, precisely five years after the certificate of voluntary dissolution was publicly filed with the Minnesota Secretary of State, and two years after the

statute permitting suit to be brought against dissolved corporations had expired. Why is there any conflict between the federal policies underlying CERCLA and the federal law of corporate capacity to be sued, when any party entitled to seek relief had ample time to sue within the permissible time period?

If a party chooses to sit on its rights for years, as petitioner did, it has no one to blame but itself, and there is no necessity for this Court to revisit generations of precedent on the issue of legal capacity to be sued simply because a plaintiff has failed to act timely. Industrial's dissolution occurred publicly and openly, and was repeatedly communicated to the authorities. There is no excuse for anyone having failed to act. Had petitioner relied and timely acted on knowledge of the dissolution, this issue would never have arisen.

C. Respondent's Reason For Dissolution, And The Circumstances And Timing Thereof, Provide No Support For Preemption.

The Eighth Circuit decision in this case, contrary to petitioner's hyperbolic mischaracterization, does not create a "blueprint for corporations" to avoid potential liability for the cost of hazardous waste clean-up. The court may well have been faced with a different situation had there been any evidence of improper motive or any substantiated fear that the decision would be used as an improper weapon, as in *Allied Corporation* and *Mottolo*. But the court affirmed the district court's determination that there was no reason that Rule 17(b) not be applied to CERCLA actions, even if liability was defeated as a result.

In a diversion from the real issue, petitioner unwarrantedly attacks Industrial's motive for dissolving when it did (Pet. at 23-24). There is no evidence to support such an accusation, and the same groundless argument failed to influence the courts below. The point is that the facts of complete, effective dissolution and petitioner's inexplicable failure to act are all that is of controlling importance. Even so, Industrial ceased actively doing business in 1979. It had no customers nor employees at that time, and began liquidating its assets and vacating its plant. That it commenced formal dissolution proceedings later is not unusual. To ascribe a bad motive to this is, once again, nothing more than a transparent attempt to deflect attention from the determinative issue: why didn't anyone step in during the liberal three-year survival period and timely sue, when Industrial never made any attempt to conceal the fact that it liquidated and dissolved?

In addition, while it is true that Industrial immediately commenced suit against its insurance carriers when the carriers denied coverage of any claim relating to the landfill, the insurance coverage suit was commenced in 1984 when the MPCA stated in writing that it felt that Industrial might be a potentially responsible party with respect to the landfill. All of these events occurred *after* Industrial had dissolved, but *during* the three-year statutory extension period, when it was surely prudent to establish coverage. After all, Industrial was capable of being sued at any time up to October 28, 1986.

Similarly, petitioner's argument about threats to the future of hazardous waste cleanup efforts also misses the mark. Petitioner wants the Court to believe that the application of corporate dissolution statutes diverts and delays

the cleanup process. But corporate dissolution statutes simply establish a time frame within which to act, a time frame fully and openly available and presumably understood in this situation. Petitioner could have sued Industrial for contribution at any time between 1983 and 1986 while expenditures for investigation and analysis were being incurred. Admittedly, such a suit would have been timely commenced. Moreover, Petitioner in fact sued for contribution long before the cleanup issues were fully resolved (they apparently are not yet fully resolved today), casting serious doubt on its argument that earlier commencement of suit would "frustrate" the typical process followed in CERCLA cases.

Petitioner bases its threat on a situation "where a major contributor seeks to use state dissolution law to avoid liability" (Pet. at 28). But there is no question that this is not an issue here. Fraud or bad faith would throw a completely different light on the situation, as it did in the *Mottolo* case. The Eighth Circuit merely allows a corporation to openly go through the dissolution process and end its existence, as has been allowed historically. There is no reason to prevent this ordinary occurrence, even weighing in the impact of CERCLA, when the avenues available to include Industrial were overlooked.

CONCLUSION

The remedy and explanation for petitioner's position lies with Congress and in its own failure to act vigilantly to protect its rights. For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 17 day of October, 1990.

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